FILED
SEP 22 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 98 - 131

IN THE

Supreme Court of the United States

October Term 1997

United States of America,

Petitioner,

v.

Sun-Diamond Growers of California,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

REPLY OF THE UNITED STATES

DONALD C. SMALTZ
Independent Counsel
(*Counsel of Record*)
THEODORE S. GREENBERG
ROBERT W. RAY
CHARLES M. KAGAY
STEPHEN R. McALLISTER
GEORGE D. BROWN
JOSEPH P. GUICHET

Office of Independent Counsel
103 Oronoco Street, Suite 200
Alexandria, VA 22314
(703) 706-0010

Balmar Legal Publishing Services, Washington, DC (202) 682-9800

13 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

I. There Is A Split In The Circuits On The Scope Of The Unlawful Gratuity Statute, 18 U.S.C. § 201(c)(1)(A) 1

II. The Scope Of The Unlawful Gratuity Statute Is Important And Recurring Issue 4

III. The District of Columbia Circuit's Decision Is Wrong 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases: **Page**

Standefer v. United States, 447 U.S. 10 (1980)..... 3
United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976)..... 2, 3
United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995)..... 2, 3
United States v. Evans, 572 F.2d 455 (5th Cir. 1978)..... 1, 3
United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986)..... 3
United States v. Muldoon, 931 F.2d 282 (4th Cir. 1991)..... 2
United States v. Sawyer, 85 F.3d 723 (1st Cir. 1996)..... 2
United States v. Secord, 726 F. Supp. 845 (D.D.C. 1989)..... 1
United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979).... 1, 2, 3
United States v. Umans, 368 F.2d 725 (2d Cir. 1966)..... 2, 3

Statutes:

18 U.S.C. § 201(a)(3)..... 6
18 U.S.C. § 201(c)(1)(A)..... 1, 5, 6

Other Sources:

H.R. Rep. No. 748, 87th Cong., 1st Sess. (July 20, 1961)..... 7

REASONS FOR GRANTING THE WRIT

I. There Is A Split In The Circuits On The Scope Of The Unlawful Gratuity Statute, 18 U.S.C. § 201(c)(1)(A)

1. Despite the industrious efforts of Sun-Diamond's counsel to argue away the significant circuit split regarding the scope of the unlawful gratuity statute, Respondent's Brief In Opposition ("Opp.") 5-14, the judges of the D.C. Circuit recognized the division of authority. Judge Wald, in concurring in the denial of the United States' suggestion for rehearing *en banc*, declared that

> I find the interpretation of 18 U.S.C. § 201(c)(1)(A) (1994) so as not to cover any gifts or gratuities made by a regulated company to high officials of the regulating agency troubling. Given the choice, I would have construed the statutory prohibition as the Fifth Circuit has done. However, I have concluded that calling for a vote on the *en banc* petition would be futile in this case. *The current circuit split calls for Supreme Court attention.*

App. 34 (internal citations omitted) (emphasis added).

2. Likewise, Sun-Diamond's suggestion in a footnote that the D.C. Circuit panel that decided this case did not acknowledge the split but, instead, only stated that the United States alleged such a split, *see* Opp. 6 n.6, is a mischaracterization of the D.C. Circuit opinion. What the panel in fact stated was the following:

> The independent counsel points to *United States v. Secord*, 726 F. Supp. 845, 847 (D.D.C. 1989), as well as several decisions by other courts of appeals apparently holding that gifts motivated solely by the recipient's official position may be illegal gratuities. See *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.1978); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir.1979) (*en*

banc); [*United States v.*] *Umans*, 368 F.2d at 730 [(2d Cir. 1966)]; *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir.1995); *cf. United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.1976) (suggesting that donee's ability to use his position for donor's benefit was enough to satisfy the official act requirement). These decisions appear to leap from the gratuity statute's lack of a reciprocal *quid pro quo* requirement to an assumption that it has dispensed with any need to show intent focused on an official act or acts. Thus, the court in *Bustamante* says, "Generally, no proof of a *quid pro quo* is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office." 45 F.3d at 940. Any such leap disregards the explicit language of the statute and contradicts *Brewster* and *Campbell*. Other out-of-circuit cases seem to take the official act requirement more seriously. *See*, e.g., *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) ("an illegal gratuity is a payment made for an act by the recipient that might have been done without any payment") (citing *Brewster*); cf. [*United States v.*] *Sawyer*, 85 F.3d at 735-36 [(1st Cir. 1996)] (construing virtually identical Massachusetts gratuity statute.

App. 11-12 (footnote omitted).

3. Unlike several other Circuits, the D.C. Circuit has rejected an interpretation of the statute that would prohibit regulated entities from giving gratuities to gain the generalized goodwill of federal officials. See App. 10 ("if Douglas furnished Espy with gifts merely to win his generalized sympathy for Sun-Diamond, those gifts would not be illegal gratuities" unless the government proved they were intended to influence Espy's performance of official acts in the future). Contrary to Sun-Diamond's protestations, there is no dispute that the D.C. Circuit's interpretation of the statute

distances it from other Circuits. *See, e.g., United States v. Umans*, 368 F.2d 725, 728 (2d Cir. 1966) (the unlawful gratuity statute "only requires proof that payment was made to an agent in a situation where no payment was necessary"); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979)(*en banc*) ("All that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position, and not solely for reasons of friendship or social purposes"), *aff'd. Standefer v. United States*, 447 U.S. 10 (1980);[1] *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978) ("under the unlawful gratuity subsection all that need be proven is that the official accepted, *because of his position*, a thing of value 'otherwise than as provided by law for the proper discharge of official duty'") (emphasis added); *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995) ("it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office"); *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986) (the purpose of the statute "is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position"); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976) (the "jury could properly conclude from the testimony at trial that [the defendant] knew [the camp administrator] was in a position to use his authority in a manner which would affect the conditions of confinement of [the defendant's] father").

---

[1] The United States acknowledges that the precise extent to which this Court ruled on the intent necessary to commit the offense of providing unlawful gratuities to a federal official is unclear from the briefs on the merits and the Court's single footnote in *Standefer v. United States*, 447 U.S. 10, 14 n.8. With all due respect, however, when this Court states that a petitioner has challenged "the instructions to the jury on criminal intent," *id.*, and then declares that "[w]e agree with the Court of Appeals that the instructions were correct," *id.*, such a statement is not "*dictum*," as Sun-Diamond argues. *See* Opp. 17.

II. The Scope Of The Unlawful Gratuity Statute Is An Important And Recurring Issue

1. The D.C. Circuit's decision in this case has potentially severe and detrimental effects on efforts to prosecute corruption of federal officials making decisions in the nation's capital. The D.C. Circuit's interpretation of the statute will make it difficult, at best, to prosecute persons or entities for bestowing largesse on federal officials in the District of Columbia before an official takes a particular action, unless the government essentially has proof of a bribe.[2] Bribery, however, is a separate and considerably more serious offense than giving unlawful gratuities under federal law, with far stiffer penalties. The D.C. Circuit's decision in this case comes perilously close to eliminating the unlawful gratuities offense as a lesser included offense of bribery when the payment or gift is made prior to any official action. *See* Brief For Public Citizen As *Amicus Curiae* In Support Of Petitioner 5-7.

2. In the United States' petition for a writ of *certiorari* and Sun-Diamond's opposition brief, the parties cite and discuss no fewer than eighteen published decisions addressing the unlawful gratuity statute, including one case that reached this Court on the merits. This number of published appellate decisions alone suggests that the gratuity statute is important, even if its meaning is not being litigated "virtually every day in courtrooms around the country." Opp. 21 n.21. In fact, it would be disheartening were the gratuity statute being litigated on such a wide scale, since such a situation would suggest an astronomical level of federal governmental corruption. This

---

[2] Sun-Diamond appears to be arguing that unlawful gratuities prosecutions are unnecessary, or perhaps that there should be no unlawful gratuity offense, because government ethics regulations prohibit similar conduct and various civil and political sanctions may be applied to officials who take gratuities. Opp. 23. Sun-Diamond does not deny, however, and cannot, that if the unlawful gratuity statute is severely limited in its scope, there often may be no *criminal* prohibition that applies to official corruption short of bribery.

Court has never indicated that its standard for granting *certiorari* is that issues do not merit the Court's plenary review unless they are the subject of litigation on a daily basis.

Moreover, the conduct that could give rise to an unlawful gratuities prosecution — the giving of gifts and things of value to federal officials — may occur on a daily basis, especially in the District of Columbia.[3] Certainly, in light of the D.C. Circuit's decision in this case, it is likely to occur more frequently.

III. The District of Columbia Circuit's Decision Is Wrong

1. Sun-Diamond devotes considerable effort to convincing the Court that the D.C. Circuit correctly interpreted the unlawful gratuity statute. Opp. 24-28. Although that proposition, even if true, would not alone counsel against this Court's review given the clear circuit split, the United States will briefly address the merits of the D.C. Circuit's decision. Sun-Diamond supports the D.C. Circuit's interpretation of the statute by relying almost exclusively on the "for or because of any official act performed or to be performed" language of § 201(c)(1)(A), as did the D.C. Circuit. Although this is a logical and appropriate starting point for the analysis, it is not the ending point for at least two reasons.

---

[3] Sun-Diamond, for example, argues that it lavished gifts and gratuities upon Espy for "legitimate reasons," Opp. 21, including "(1) to foster Douglas's information network; (2) to develop personal relationships with other high-level government officials; and (3) to enhance Douglas's status in the agricultural and lobbying communities by being seen with a Cabinet Secretary." *Id.* at 22. But surely not everyone, perhaps not even most, would agree that the foregoing are "legitimate reasons" for providing gratuities worth thousands of dollars to a Cabinet Secretary. Moreover, it is no defense in this case, in which Sun-Diamond — the corporate entity — *is the defendant*, to argue that Douglas gave Espy gifts because the two men were longtime friends. *See id.* Douglas and Espy apparently were friends, but *Sun-Diamond paid* for the gratuities, not Douglas.

2. Very importantly, the phrase "official act" is defined in the statute. This definition, to which neither the D.C. Circuit nor Sun-Diamond gives any attention in their analyses of the statute, is very broad. Specifically, "official act" is defined as

> any decision or action on *any* question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3).

The statutory definition suggests that § 201(c)(1)(A) reaches gifts to federal officials motivated by matters that may not yet be pending before those officials (matters "which may at any time be pending"), or perhaps even which may never actually be pending (matters "which may by law be brought before any public official"). Moreover, the definition of "official act" focuses in part on the official's *position* (matters before the official in "such official's official capacity, or in such official's place of trust or profit"), a proposition the D.C. Circuit flatly rejected in this case. The broad definition of "official act," coupled with the statute's express application to "any" such acts "to be performed," counters the D.C. Circuit's and Sun-Diamond's position that the statute's language requires proof of specific official acts that the official has or will in the future perform in exchange for the gratuity.

Incorporating the definition of "official act" into § 201(c)(1)(A), it is both consistent with the statutory language and sensible to conclude that the unlawful gratuity statute reaches efforts to buy favor or generalized goodwill from an official who either has been, is, or may be at some unknown, unspecified later time, in a position to act favorably to the giver's interests. Literally, the statutory provisions operate together to provide that an unlawful gratuity offense

has been committed when a person gives a thing of value to a federal public official

> for or because of any [decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit] performed or to be performed by such public official . . . .

As Judge Wald recognized, a straightforward reading of the statutes appears to cover the provision of gratuities to a Cabinet Secretary by a regulated entity that in the past has had, currently has, or in the future likely will have matters pending before the Secretary. App. 34 ("I admit that the main distinction the panel draws between gifts motivated by an official's 'position' and gifts motivated by an official's 'acts' eludes me altogether.").

3. The structure of the statute and the formal legislative history strongly suggest that Congress created two separate offenses in this context — bribery and unlawful gratuities — that have different elements and different punishments. As previously discussed, although § 201 is labeled a "Bribery" statute, Congress, the courts and commentators long have recognized that it creates two different offenses. *See* United States' Petition For A Writ Of Certiorari 21-22. Moreover, the House Report that accompanied the original § 201 provisions in 1961 clearly indicates that Congress contemplated the offense of giving or receiving an unlawful gratuity to be an important but lesser offense than bribery. In describing the unlawful gratuity offense, the Report declares that "[t]he conduct which is forbidden has the appearance of evil and the capacity of serving as a cover for evil." H.R. Rep. No. 748, at 19 (July 20, 1961) (emphasis added).

The D.C. Circuit's decision, however, makes it difficult, at best, to obtain an unlawful gratuity conviction when a

gratuity is given in anticipation of future official action, unless the Government essentially proves bribery. The statute's language, structure and history do not require that result, and most other circuits have not so limited the statute's application.

CONCLUSION

The D.C. Circuit's decision in this case creates a significant circuit split on the scope of an important federal criminal statute. The unfortunate result of the D.C. Circuit's decision is that the federal law applied in the District of Columbia is the most tolerant of gratuities given to federal officials, such as Cabinet Secretaries. Unlawful gratuities prosecutions have occurred multiple times during the years. As the *amicus* brief in support of the United States demonstrates, the unlawful gratuity statute matters to anyone who is concerned about government integrity, as everyone should be. Moreover, the brief in opposition demonstrates that Sun-Diamond's counsel will provide a spirited defense of the D.C. Circuit's decision.

For the foregoing reasons and the reasons set forth at length in the petition for a writ of *certiorari*, the United States respectfully requests that the Court grant plenary review to resolve the circuit conflict and establish the proper interpretation of 18 U.S.C. § 201(c)(1)(A).

Respectfully submitted,

DONALD C. SMALTZ
Independent Counsel
(*Counsel of Record*)
THEODORE S. GREENBERG
ROBERT W. RAY
CHARLES M. KAGAY
STEPHEN R. McALLISTER
GEORGE D. BROWN
JOSEPH P. GUICHET

Office of Independent Counsel
103 Oronoco Street, Suite 200
Alexandria, VA 22314
(703) 706-0010

September, 1998